

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 KEITH MASATO TAMASHIRO,) NO. CV 12-10286-E
12 Plaintiff,)
13 v.) MEMORANDUM OPINION
14 CAROLYN W. COLVIN, ACTING) AND ORDER OF REMAND
15 COMMISSIONER OF SOCIAL SECURITY,¹)
16 Defendant.)
17

18 Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS
19 HEREBY ORDERED that Plaintiff's and Defendant's motions for summary
20 judgment are denied, and this matter is remanded for further
21 administrative action consistent with this Opinion.
22

23 PROCEEDINGS
24

25 Plaintiff filed a complaint on December 3, 2012, seeking review
26 of the Commissioner's denial of benefits. The parties consented to
27

28 ¹ Carolyn W. Colvin, who became Acting Commissioner of
Social Security as of February 14, 2013, is hereby substituted as
Defendant in this matter. See Fed. R. Civ. P. 25(d)(1); 42
U.S.C. § 405(g).

1 proceed before a United States Magistrate Judge on January 4, 2013.
2 Plaintiff filed a motion for summary judgment on June 20, 2013.
3 Defendant filed a motion for summary judgment on August 19, 2013. The
4 Court has taken the motions under submission without oral argument.
5 See L.R. 7-15; "Order," filed December 6, 2012.

6 7 **BACKGROUND**

8
9 On June 3, 2010, Plaintiff filed an application for disability
10 insurance benefits (Administrative Record ("A.R.") 114-15). Plaintiff
11 asserts disability since January 31, 2006, based on alleged
12 "subarachnoid hemorrhage," "severe short term memory loss," "double
13 vision," and "artery pseudoaneurysm severe short term memory loss"
14 (A.R. 114, 130). An Administrative Law Judge ("ALJ") found that
15 Plaintiff suffers from severe "late results of stroke," short term
16 memory loss, and borderline intellectual functioning (A.R. 28, 32, 34-
17 35).

18
19 The ALJ found that Plaintiff retains the residual functional
20 capacity to perform work at any exertion level, but limited to:
21 simple repetitive tasks, low stress work, no work requiring operation
22 of motor vehicles or working around machinery, or work at heights or
23 around bodies of water (A.R. 24). Relying on the testimony of a
24 vocational expert, the ALJ found that, with this capacity, Plaintiff
25 could not perform his past relevant work but could work as a hand
26 packager or sorter (A.R. 37-38 (adopting vocational expert's testimony
27 at A.R. 64-65)). Accordingly, the ALJ found Plaintiff not disabled
28 (A.R. 38). The Appeals Council denied review (A.R. 1-3).

STANDARD OF REVIEW

Under 42 U.S.C. section 405(g), this Court reviews the Administration's decision to determine if: (1) the Administration's findings are supported by substantial evidence; and (2) the Administration used correct legal standards. See Carmickle v. Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted); see also Widmark v. Barnhart, 454 F.3d 1063, 1067 (9th Cir. 2006).

DISCUSSION

Plaintiff contends, inter alia, that the ALJ erred in evaluating the opinions of Plaintiff's treating physicians. For the reasons discussed below, the Court agrees.

A. The Relevant Medical Record

As the ALJ acknowledged, the medical record reflects Plaintiff's brain trauma, and is "replete" with documented treatment for complaints regarding Plaintiff's memory loss. See A.R. 32, 34 (citing A.R. 180-385, 387, 390, 392, 399, 624, 637-842, 943-44); see also A.R. 682 (neurological treatment note from April 2008 reporting that cognition testing revealed impairment in multiple domains including memory, language, visuospatial abilities, and executive function).

1 Plaintiff was admitted to UCLA Health Systems for treatment on
2 February 2, 2006, following a subarachnoid hemorrhage that occurred on
3 January 31, 2006 (A.R. 357-59). Plaintiff was hospitalized until
4 May 2, 2006, undergoing multiple operations to treat his condition.
5 Plaintiff then was discharged to a skilled nursing facility. See A.R.
6 357-58. It is not clear from the record how long Plaintiff remained
7 in the skilled nursing facility.

8
9 The records also include references to Plaintiff having an
10 antalgic gait with some notation of loss of balance when heel to toe
11 walking on examination in November 2006, February 2007, May 2007,
12 January 2008. See A.R. 388, 389, 391, 392; see also A.R. 677
13 (neurology treatment note from September 2008 reporting normal gait
14 but some difficulty with tandem gait), A.R. 667-68, 670-71, 673-74
15 (neurology treatment notes from February 2009, August 2009 and
16 February 2010 reporting "loss of balance" but normal gait), A.R. 895-
17 96 (treatment note from October 2010 reporting Plaintiff had a
18 "wobbly" gait and fell that morning, and on examination exhibited
19 unsteadiness walking, especially on heel and tandem walking, and
20 referring Plaintiff to neurology); but see A.R. 665, 680, 683, 686
21 (neurology treatment notes from December 2007, April 2008, June 2008
22 and June 2010 reporting normal casual gait). A subsequent
23 neurological evaluation from January 2011 reported a normal casual
24 gait but a neurological examination "significant" for "slight impaired

25 ///

26 ///

27 ///

28 ///

1 short-term recall and diffuse hyperreflexia" (A.R. 943-44).²

2
3 The record contains partial copies of forms submitted by
4 Plaintiff's treating physicians for Plaintiff's private disability
5 insurance (A.R. 400-09). These forms, which are missing multiple
6 pages, date from approximately May 2006 through November 2008. Id.³
7 Available information from the forms is summarized as follows:
8

9 In 2006, treating neurologist Paul Vespa reported on the earliest
10 form (which, as supplied, consists of only page 1 of a 4-page form)
11 that Plaintiff was not able to work starting on January 31, 2006, and
12 was then in the UCLA Neuroscience ICU due to a ruptured right
13 vertebral artery pseudoaneurysm, coma, and hydrocephalus as
14 shown by a cerebral angiogram (A.R. 400). There is no information
15 concerning any particular future limitations Dr. Vespa may have
16 assigned to Plaintiff at that time.

17 ///

18 ///

19 _____
20 ² Hyperreflexia is defined as "overactivity of the
21 physiological reflexes." See Merriam-Webster Medical Dictionary
22 entry for "hyperreflexia," available online at
<http://www.merriam-webster.com/medical/hyperreflexia> (last
visited Sept. 18, 2013).

23 ³ On August 4, 2010, the Administration requested that
24 the insurance company provide copies of Plaintiff's medical
25 records. The insurance company replied by letter dated
26 August 23, 2010, indicating that the company did not possess any
27 medical records for Plaintiff (A.R. 843-44). The partial
28 insurance forms provided have a facsimile transmission date of
September 1, 2010. See A.R. 400-09. There is no indication in
the record that anyone requested from the physicians themselves
the missing pages from the insurance forms (or the missing
content of the physicians' opinions).

1 In an October 2006 form (which, as supplied, consists of pages 1
2 and 3 of a 4-page form), treating psychiatrist Yong Lee reported that
3 Plaintiff had suffered a subarachnoid hemorrhage and had "significant"
4 short term memory loss (A.R. 403-04). Since the last report,
5 Plaintiff was status post craniotomy secondary to infection from a
6 previous craniotomy and had developed a seizure disorder (A.R. 403).
7 Plaintiff was taking anti-seizure medication (A.R. 403). Dr. Lee
8 opined that Plaintiff would be unable to be left alone but could
9 complete dressing, grooming, bathing, toileting, and showering
10 independently (A.R. 403). Dr. Lee indicated that Plaintiff then was
11 receiving acute brain injury rehabilitation, and could not return to
12 his usual job due to his short term memory loss (A.R. 404). There is
13 no further information concerning what other limitations, if any, Dr.
14 Lee may have assigned to Plaintiff at that time.

15
16 In a May 2007 form (which, as supplied, consists of pages 1 and 3
17 of a 4-page form), treating physical medicine and rehabilitation
18 doctor Vibhay Prasad reported that Plaintiff had poor attention and no
19 memory (A.R. 408-09). Dr. Prasad indicated that Plaintiff had a
20 seizure disorder and opined that Plaintiff could not drive, use power
21 equipment, or work at heights (A.R. 408). Dr. Prasad also opined that
22 Plaintiff was precluded from any jobs requiring memory (A.R. 409).
23 Plaintiff was undergoing cognitive rehabilitation and vocational
24 retraining (A.R. 409). There is no further information concerning
25 what other limitations, if any, Dr. Prasad may have assigned to
26 Plaintiff at that time.

27 ///

28 ///

1 Dr. Prasad provided another form in January 2008 with more detail
2 (the record includes pages 1, 2 and 3 of a 4-page form). See A.R.
3 405-07; see also A.R. 390-91 (treatment note from same date). Dr.
4 Prasad reported that objectively Plaintiff had mild left weakness, an
5 ataxic left leg, impaired attention, delayed processing speed,
6 impaired short term memory, and that subjectively Plaintiff had
7 forgetfulness, falling, and difficulty reading (A.R. 405). Plaintiff
8 was in cognitive rehabilitation (A.R. 405). Dr. Prasad opined that
9 Plaintiff was unable to live independently because his memory and
10 cognitive impairments make him unsafe, and that Plaintiff could not
11 drive or operate machinery (A.R. 405). Dr. Prasad indicated that
12 Plaintiff would have limitations standing, sitting, walking, bending,
13 stooping, lifting, and carrying because he "looses" [sic] his balance,
14 and limitations using his hands because his left side is mildly weak
15 (A.R. 406). Inexplicably, however, Dr. Prasad checked a box under
16 "physical impairment" indicating "no limitation of functional
17 capacity; no restrictions" (A.R. 406). Dr. Prasad opined that
18 Plaintiff is too forgetful to work on projects without direct
19 supervision or to interact with clients, but could work in supervised
20 environments if he did not drive to work (A.R. 407). Dr. Prasad did
21 not expect a change in Plaintiff's condition, explaining that no
22 further recovery was expected and Plaintiff's condition had reached a
23 plateau functionally (A.R. 407).

24
25 In a November 2008 form (which, as supplied, consists only of
26 pages 1 and 3 of a 4-page form), treating family medicine physician
27 Lawrence Hwang reported that Plaintiff had repeated seizures since the
28 most recent previous report (A.R. 401). Plaintiff could not drive or

1 ride a bicycle (A.R. 401). Dr. Hwang opined that Plaintiff would be
 2 limited from any jobs requiring long term memory or "excessive
 3 ambulation," but could work in a "seated workplace" (A.R. 402). There
 4 is no further information concerning what additional limitations, if
 5 any, Dr. Hwang may have assigned to Plaintiff at that time.

6 7 **B. The ALJ's Decision**

8
 9 In finding Plaintiff not disabled, the ALJ rejected Dr. Vespa's
 10 one-page opinion (A.R. 400) as assertedly: (1) conclusory;
 11 (2) lacking explanation or any clinical or diagnostic findings; and
 12 (3) inconsistent with other evidence of record (A.R. 35). The ALJ did
 13 not mention any of the above-summarized treating physician opinions
 14 from Dr. Lee, Dr. Prasad,⁴ or Dr. Hwang. See A.R. 35.⁵

15 16 **C. Discussion**

17
 18 A treating physician's conclusions "must be given substantial
 19 weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988); see
 20 Rodriguez v. Bowen, 876 F.2d 759, 762 (9th Cir. 1989) ("the ALJ must
 21 give sufficient weight to the subjective aspects of a doctor's
 22 opinion. . . . This is especially true when the opinion is that of a
 23 treating physician") (citation omitted); see also Orn v. Astrue, 495

24
 25 ⁴ The ALJ did mention Dr. Prasad's records from 2006-07,
 26 which records predate the above-summarized opinions from Dr.
 27 Prasad (A.R. 33, 35).

28 ⁵ From the ALJ's limited reference to the insurance form
 from Dr. Vespa (A.R. 35), it is not clear whether the ALJ was
 aware that the insurance forms provided were incomplete.

1 F.3d 625, 631-33 (9th Cir. 2007) (discussing deference owed to
2 treating physician opinions). Even where the treating physician's
3 opinions are contradicted,⁶ "if the ALJ wishes to disregard the
4 opinion[s] of the treating physician he . . . must make findings
5 setting forth specific, legitimate reasons for doing so that are based
6 on substantial evidence in the record." Winans v. Bowen, 853 F.2d
7 643, 647 (9th Cir. 1987) (citation, quotations and brackets omitted);
8 see Rodriguez v. Bowen, 876 F.2d at 762 ("The ALJ may disregard the
9 treating physician's opinion, but only by setting forth specific,
10 legitimate reasons for doing so, and this decision must itself be
11 based on substantial evidence") (citation and quotations omitted).
12

13 Furthermore, "[t]he ALJ has a special duty to fully and fairly
14 develop the record and to assure that the claimant's interests are
15 considered. This duty exists even when the claimant is represented by
16 counsel." Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983); see
17 also Sims v. Apfel, 530 U.S. 103, 110-11 (2000) ("Social Security
18 proceedings are inquisitorial rather than adversarial. It is the
19 ALJ's duty to investigate the facts and develop the arguments both for
20 and against granting benefits. . . ."). As effective at the time the
21 ALJ rendered his decision, section 404.1512(e) of 20 C.F.R. provided
22 that the Administration "will seek additional evidence or
23 clarification from your medical source when the report from your
24 medical source contains a conflict or ambiguity that must be resolved,
25

26
27 ⁶ Rejection of an uncontradicted opinion of a treating
28 physician requires a statement of "clear and convincing" reasons.
Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996); Gallant v.
Heckler, 753 F.2d 1450, 1454 (9th Cir. 1984).

1 the report does not contain all of the necessary information, or does
 2 not appear to be based on medically acceptable clinical and laboratory
 3 diagnostic techniques." See 20 C.F.R. § 1512(e) (eff. June 13, 2011
 4 through Mar. 25, 2012);⁷ see also Smolen v. Chater, 80 F.3d at 1288
 5 ("If the ALJ thought he needed to know the basis of Dr. Hoeflich's
 6 opinions in order to evaluate them, he had a duty to conduct an
 7 appropriate inquiry, for example, by subpoenaing the physicians or
 8 submitting further questions to them. He could also have continued
 9 the hearing to augment the record") (citations omitted). The ALJ's
 10 duty under former section 404.1512(e) is triggered "when there is
 11 ambiguous evidence or when the record is inadequate to allow for
 12 proper evaluation of the evidence." Mayes v. Massanari, 276 F.3d 453,
 13 459-60 (9th Cir. 2001) (citation omitted).

14
 15 Here, the ALJ erred in failing to develop the record with respect
 16 to the pages missing from each of the treating physician's opinions,
 17 including the pages missing from Dr. Vespa's opinion. See 20 C.F.R.
 18 404.1512(e) (2011). The ALJ also erred in failing to mention the
 19 opinions of Drs. Lee, Prasad, and Hwang, and in failing to state
 20 "specific, legitimate" reasons for implicitly rejecting the portions
 21 of those opinions that were inconsistent with the ALJ's decision. See
 22 Lingenfelter v. Astrue, 504 F.3d 1028, 1038 n.10 (9th Cir. 2007) ("Of
 23 course, an ALJ cannot avoid these requirements [to state specific,
 24 legitimate reasons] by not mentioning the treating physician's opinion
 25 and making findings contrary to it."); Salvadore v. Sullivan, 917 F.2d
 26 13, 15 (9th Cir. 1990) (implicit rejection of treating physician's

27
 28 ⁷ Paragraph (e) has since been deleted from this section.
See 20 C.F.R. § 404.1512.

1 opinion cannot satisfy Administration's obligation to set forth
2 "specific, legitimate reasons").

3
4 The Court is unable to conclude that these errors were harmless.
5 The ALJ rejected Dr. Vespa's opinions, at least in part, based on a
6 perception that the opinions lacked explanation and support. A more
7 developed record might have provided sufficient explanation and
8 support. Both Drs. Prasad and Hwang opined that Plaintiff would have
9 limitations standing and walking (A.R. 402, 406). Dr. Prasad
10 attributed the limitations to balance problems, which are documented
11 in the record. See, e.g., A.R. 391, 895-96; see also A.R. 162
12 (Disability Report - Appeal form dated October 10, 2010, reporting
13 that Plaintiff had been unsteady with walking beginning in October
14 2010). Dr. Hwang opined that Plaintiff could work only from a seated
15 position. Dr. Lee believed Plaintiff was unsafe to be left alone.

16
17 Defendant's Motion discusses the partial opinions of Drs. Lee,
18 Prasad, and Hwang, and argues reasons why the ALJ may have implicitly
19 accepted or rejected those opinions. See Defendant's Motion, pp. 3-5.
20 Even if the opinions in the record from these treating physicians were
21 complete (which they are not), the Court would be unable to affirm the
22 ALJ's decision on the basis of any of the reasons Defendant
23 hypothesizes. See Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir.
24 2001) (court "cannot affirm the decision of an agency on a ground that
25 the agency did not invoke in making its decision").

26 ///

27 ///

28 ///

1 Because the circumstances of this case suggest that further
 2 administrative review could remedy the ALJ's errors, remand is
 3 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see
 4 generally INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an
 5 administrative determination, the proper course is remand for
 6 additional agency investigation or explanation, except in rare
 7 circumstances).⁸

8 9 CONCLUSION

10
 11 For all of the foregoing reasons,⁹ Plaintiff's and Defendant's
 12 motions for summary judgment are denied and this matter is remanded
 13 for further administrative action consistent with this Opinion.

14
 15 LET JUDGMENT BE ENTERED ACCORDINGLY.

16
 17 DATED: September 24, 2013.

18
 19 _____/s/
 20 CHARLES F. EICK
 21 UNITED STATES MAGISTRATE JUDGE

22
 23 ⁸ There are outstanding issues that must be resolved
 24 before a proper disability determination can be made in the
 25 present case. For at least this reason, the Ninth Circuit's
 26 decision in Harman v. Apfel, 211 F.3d 1172 (9th Cir.), cert.
 27 denied, 531 U.S. 1038 (2000) does not compel a reversal for the
 28 immediate payment of benefits.

⁹ The Court has not reached any other issue raised by
 Plaintiff except insofar as to determine that reversal with a
 directive for the immediate payment of benefits would not be
 appropriate at this time.